87-255

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MAGD E. ZOHDI, QUALITY CONTRACTING AND SERVICES INC., ET AL — PETITIONERS

VERSUS

THE FEDERAL SAVINGS AND LOAN INSURANCE CORP. AS RECEIVER OF SUN BELT FEDERAL BANK, F. S. B. — RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the FSLIC has adjudicatory power under 12 U.S.C. 1464(d)(6)(c) and 1729(d) and Article III of the Constitution to determine all claims against the failed savings and loan in receivership, regardless of the nature of the claim; and adjudicatory power to determine all claims against the FSLIC and Federal Home Loan Bank Board in their individual capacities.

2. If FSLIC does have such power, are the courts divested of all jurisdiction upon failure of the savings and loan?

3. If FSLIC does have such power, what is the standard of review under the Administrative Procedures Act?

4. Even if FSLIC does have adjudicatory power, is the FSLIC and the Bank Board estopped to exercise such power as a result of the actions of the savings and loan and the Bank Board immediately prior to failure?

PARTIES TO THE PROCEEDINGS

Magd. E. Zohdi
Quality Contracting and Services, Inc.
Quality-Standard Joint Venture
Commercial Building Supply, Inc.
J.F. Naylor and Co.
George Bonfanti
Gerald E. Fackrell, Jr.
V. James Stewart
Noel "Butch" Baum and Janet F. Baum
BFC VIII, Ltd.
Harry Adcock
Larry Tullos
James Dodds
Louisiana Public Facilities Authority
Cameron Brown Mortgage Corp.
American Bank and Trust Co.
Metropolitan Bank and Trust Co.
Approximately 79 sub-contractors and material suppliers on
Jefferson Lakes Apartment complex
Approximately 92 sub-contractors and material suppliers on
Essen Centre office building
Federl Savings and Loan Insurance Corporaiton, individually
and as receiver of Sun Belt Federal Bank, F.S.B.
Federal Home Loan Bank Board

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IN THE
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OCTOBER TERM, 1987

NO.

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER OF SUN BELT FEDERAL BANK, F.S.B., RESPONDENT

VERSUS

GEORGE M. BONFANTI, GERALD E. FACKRELL, JR., ET AL.
PETITIONERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Magd E. Zohdi, Quality Contracting and Services, Inc., Commercial Building Supply, Inc., and Quality-Standard Joint Venture repectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 8, 1987.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

OPINIONS BELOW

The opinion of the Court of Appeals was an unpublished opinion pursuant to Local Rule 47.5. A copy of the opinion is attached hereto as Appendix A. A copy of the opinion of the United States District Court for the Middle District of Louisiana ordering compliance with its December, 1985 judgment, and Exhibit "A" of that judgment, is attached hereto as Appendix B.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fifth Circuit was enterred on May 8, 1987. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. 1254(1).

STATUTES INVOLVED

This Case involves the interpretation of 12 U. S. C. 1464(d)(6)(C) and 1729(d) as follows:

1464(d)(6)(C) Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator

or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

1729(d) In connection with the liquidation of insured institutions, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

STATEMENT OF THE CASE

In 1984, Sun Belt Federal Bank, F.S.B. (Sun Belt) made two large construction loans secured by mortgages on two real estate project in Baton Rouge, Louisiana. One loan for a total of $10.8 million was for construction of Jefferson Lakes Apartments, with four individuals as owners and borrowers, the second loan for $8.3 million was for construction of a multi-story office building known as Essen Centre; both involving the same general contractor, Bonfanti-Fackrell.

Apparently without checking progress, Sun Belt advanced substantially all of the funds on each project. When the two projects went into default, each was only fractionally completed.

Sub-contractors, materialmen and laborers filed liens on each project; Sun Belt, now under the supervisory jurisdiction of the Federal Home Loan Bank Board (Bank Board), filed a R.I.C.O. suit against the borrowers, contractors,

architects and related parties; and the borrowers filed suits against Sun Belt. In subsequent actions, criminal charges were brought against former Sun Belt officers.

In December 1985, Judge Frank J. Polozola of the U.S. District Court for the Middle District of Louisiana agreed to assist in an effort to settle all of the related actions. Various conferences were had between the parties to those lawsuits, the various lien holders, participating banks, and other non-parties who would be affected by the outcome.

All discussions culminated in an extensive settlement agreement that was approved by the Bank Board both orally and in writing, which judgment was then read into the Court record on December 23, 1985. This settlement agreement is designated as Exhibit "A" of the District Court's January, 1987 Judgment, a copy of which is attached hereto as Appendix B.

The settlement agreement, approved in writing by the Bank Board, provided that Sun Belt would drop all of its claims against the borrowers, contractor, and land owners, including R.I.C.O. claims; that those parties would drop all claims against Sun Belt; that the lien holders would cancel their liens and drop all claims against Sun Belt, the owners, the contractor, and the borrowers; that Sun Belt would get title to the properties; that Sun Belt would pay the lien holders a portion of their claim on Jefferson Lakes and Essen Centre; and that Sun Belt would contract with two of the largest lien holders to complete construction of the two projects, using the remaining lien holders as sub-contractors where feasible. In connection with the contract, the new general contractors were to receive a first mortgage on the properties to guarantee performance by Sun Belt.

The parties and non-parties acted together to get the suits and liens cancelled. The new construction contract for Jefferson Lakes was drafted and a copy was sent to the Bank Board for its approval. Sun Belt received from the Bank Board written authorization to sign the contract on April 30, 1986; the contract was signed on April 30; the last liens were cancelled on April 30; and an act was recorded transferring title from the four owners to Sun Belt. On May 1, the general contractors were ordered by Sun Belt to start work, which they did.

However, also on May 1, with full knowledge of all of these events, the Bank Board made the decision to close Sun Belt and appoint FSLIC as receiver, which was accomplished on May 2, 1986.

The December 23, 1985 settlement agreement regarding Essen Centre required several conditions precedent before work could resume;

however, as the owner was (and still is) in bankruptcy, many of those conditions have failed to occur, thus that project has remained at a total standstill from the summer of 1985 to today.

Sun Belt/Bank Board/FSLIC obtained ownership of the apartment property, they obtained cancellation of liens and lawsuits, they have benefited by additional work by the new general contractor, and they have obtained many other benefits regarding Jefferson Lakes. The only action they have taken to uphold their portion of the bilateral agreement was to reluctantly pay the $900,000. They have not paid the remaining $300,000., they have not paid for the new general contractor's work done to date in good faith under the April 30 contract, they have refused to provide the new general contractor its mortgage, and they have refused to allow work to progress on the project to protect it from the elements. As a result, the project, which is composed of

unfinished wooden structures, has deteriorated drastically since May 1, 1986, due solely to the gross neglect by the FSLIC to properly protect the asset.

Following FSLIC's failure to resume construction under its agreement, the new general contractor and the former lien holders filed a motion in the district court to compel compliance with that court's December 23, 1985 order. Following a hearing, the District Court ruled that it had jurisdiction to adjudicate and enforce its own judgment, with civil and criminal contempt penalties if required, and ordered compliance on December 19, 1986 (See Appendix B). FSLIC, one of the parties to the judgment by virtue of the receivership of Sun Belt, argued that the District Court lost jurisdiction of this entire matter upon the failure of Sun Belt.

On appeal, the United Statees Court of Appeals for the Fifth Circuit ruled that under

the case law of the Fifth Circuit, on May 1, 1986, Judge Polozola lost subject matter jurisdiction over Sun Belt. Petitioners seek writs to this Honorable Court to review that ruling of the Fifth Circuit.

To summarize important dates:

March 21 and June 20, 1985 - Sun Belt put under supervisory jurisdiction of Federal Home Loan Bank Board, C.R. Brooks, Supervisory Agent.

December 23, 1985--Settlement reached in Federal District Court.

January 7, 1986--Bank Board's December 23 oral approval of settlement confirmed in writing by Brooks.

April 29, 1986--new Jefferson Lakes Construction contract approved in writing by Brooks.

April 30, 1986--Last lien cancelled, transfer of title to property completed, construction contract signed by bank and new general contractors.

May 1, 1986-Contractors advised in writing to proceed, work begun; FSLIC appointed receiver of Sun Belt by Federal Home Loan Bank Board.

May 2, 1986--Sun Belt closed by FSLIC.

May 16, 1986--Contractors advised to cease

work under contract; however, they were not paid for this new work.

December 19, 1986--All parties ordered to comply with terms of the December 23, 1985 judgment; work resumed by contractors.

January 8, 1987--Stay granted by Fifth Circuit; work stopped by contractors; however, they were not paid for this new work.

REASONS FOR GRANTING THE WRIT

The opinion of the Fifth Circuit in the Bonfanti-Fackrell case is in direct conflict with the Ninth Circuit Court of Appeals interpretation of 12 U.S.C. 1464(d)(6)(C) and 1729(d). See Morrison-Knudsen Co., Inc. v. CHG International, Inc. 811 F. 2d 1209 (9th Cir. 1987).

Section 1464(d)(6)(C) provides that "no court may . . . restrain or affect the exercise of power or functions of a conservator or receiver." and Section 1729(d) provides in part that:

> In connection with the liquidation of insured institutions in default, the receiver shall have power . . . to settle, compromise, or release claims in favor of or against the injured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the . . . other public authority having jurisdiction over the matter.

The Fifth Circuit has interpreted those sections to divest federal courts of subject matter jurisdiction over all claims against savings and loans until the FSLIC completes its administrative claims process.

See North Mississippi Savings & Loan Assn. v. Hudspeth, 756 F.2d 1096 (5th Cir. 1985), cert. denied, and Chupik Corp. v. FSLIC, 790 F.2d 1269 (5th Cir. 1986).

The Fifth Circuit stated its position in Hudspeth:

> "Congress wanted the FSLIC to be able to act quickly and decisively in reorganizing, operating, or dissolving a failed institution, and intended that the FSLIC's ability to accomplish these goals not be interfered with by other judicial or regulatory authorities."

In its reasoning in the Bonfanti-Fackrell case at bar, the Fifth Circuit cited its Hudspeth and Chupik decisions and simply stated "Hudspeth is too clear-- there are no end runs around the receiver's broad realm of authority." The Fifth Circuit made this decision by memorandum opinion without even affording the parties the privilege of an oral arguement before the panel.

However, the Fifth Circuit was aware of Morrison-Knudsen, as it chose to disregard the contrary decision in a footnote:

"3.Morrison-Knudsen simply refused to follow Hudspeth's holding and cited no intervening Supreme Court precedent as guiding its choice of position."

From reading the Court's reasons, it thus appears that the Fifth Circuit applied the Hudspeth case without considering the very unique aspects and circumstances surrounding FSLIC's involvement in the first place and Sun Belt's lack of privity of contract with the lien claimants until they were no longer lien holders but only unsecured creditors of the savings and loan on April 30, 1986.

It appears that the Fifth Circuit also failed to recognize or address whether the FSLIC or the Bank Board were affected by the theory of equitable estoppel, which should apply to this case and is set forth as follows:

"Equitable estoppel may be defined as the effect of the voluntary conduct of a party whereby he is precluded from asserting rights against another who

> has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct. Founded upon good faith, the doctrine is designed to prevent injustice by barring a party, under special circumstances, from taking a position contrary to his prior acts, admissions, representations, or silence."
> American Bank & Trust Co. v. Trinity Universal Insurance Co., 205 So. 2d 35 (La. 1967):

All of the lien claimants changed their positions (cancelled liens and released personal actions) based upon the representations of Sun Belt, a representation that was approved in writing by the Bank Board and suggested by a Federal Judge; and because of their reliance, the lien holders changed their position to their detriment.

The Fifth Circuit may also have failed to recognize that the delay in this case is seriously destroying on asset. The apartment buildings were wood structures mostly unprotected from the weather. The delay caused by FSLIC

inaction and carelessness has resulted in millions of dollars of damage to the buildings and land.

The Fifth Circuit, by reversing solely based upon Hudspeth, may not have realized that the action in the court below did not involve a mere contract, claim or lawsuit. The actions below had been reduced to a final judgment of a United States district judge. Sun Belt and the Bank Board consented to a judgment whereby various parties and non-parties received benefits and gave up rights in order to put an end to complicated litigation. Once the settlement was reduced to judgment, they cannot be permitted to declare "King's X" and back out of the judgment. See White Farm Equipment v. Kupcho 729 F. 2d 526 (5th Cir. 1986).

In Morrison-Knudsen the Ninth Circuit specifically rejected Hudspeth and the Fifth Circuit's interpretation of 12 U.S.C. 1464 (d)(6)(C) and 1729(d) for basically five reasons:

1. Congress did not give FSLIC power to adjudicate. FSLIC is only a receiver; adjudication of core matters is reserved to Article III courts.

2. The standard of review of FSLIC claims is not clearly set forth by the statutes.

3. FSLIC is involved in the claims process in many different capacities.

4. Requiring parties to go through the administrative process may be too time consuming.

5. As FSLIC cannot itself adjudicate, it must appear before the courts just like anyone else involved in a dispute.

1. Power to adjudicate

The Fifth Circuit in Hudspeth and in FSLIC vs. Bonfanti-Fackrell reasoned that judicial resolution of claims would delay the receivership function and is thus a "restraint" of FSLIC. The Ninth Circuit in Morrison-Knudsen stated that 1464(d)(6)(C) does not add to FSLIC's receivership powers, it simply prohibits a court from interfering with them. The Ninth Circuit determined that:

> "...a receiver's ordinary functions do not include adjudication. Judicial adjudication, to repeat, does not restrain or affect a receivership; it simply determines the existence and amount of claims that a receiver is to honor in its eventual distribution of assets.
>
> * * *
>
> FSLIC's basic contention is that Congress intended the agency's receivership powers to go beyond those of an ordinary receiver. It has not established its case. Hudspeth in effect permitted section 1464(d)(6)(C) to expand FSLIC's receivership authority. We decline to do so.

* * *

> FSLIC is no more an adjudicator under this regulation than is an insurance company authorized to "disallow" any claim not proved to its satisfaction and required to notify claimants thereof. The administrative process that the regulations prescribes authorizes FSLIC and the Board, by disallowance of a claim and notice to the claimant, to determine whether a dispute exists. It does not empower FSLIC to resolve the dispute with the force of law."

The Ninth Circuit compared FSLIC's claimed powers with those of the FDIC and found that no court or statute has vested FDIC with the "ultimate power to adjudicate creditor's claims."

Regarding Sections 1464 and 1729, the Ninth Circuit held that:

> "A bare duty to pay debts does not imply the power to decide finally, subject only to review under the Administrative Procedure Act, what debts must be paid.

* * *

> In addition, we note that the statute, by explicitly authorizing FSLIC to "settle, compromise, or release" claims delineates powers that not only are distinguishable from the power to adjudicate but are to some extent incompatible with it. Settlement and compromise strongly suggest the presence of the power of the other party to take the dispute to court. Settlement and compromise are to avoid that result.
>
> * * *
>
> The entire statutory framework strongly suggests that Congress intended FSLIC to be a receiver, not an adjudicator. Had it intended the latter, we are confident it would have given substantial attention to the procedural and substantive rights of claimants as well as the rights, duties, and responsibilities of FSLIC."

Regarding the powers that were conferred upon FSLIC by Congress, the Ninth Circuit noted that the statutory framework and powers regarding the supervision of ongoing savings and loans occupy several pages of the United States Code,

giving "detailed, exact, and comprehensive measures precisely delineating agency procedure, the remedies available, and judicial review", while the statutory framework giving FSLIC adjudicatory power and duties is contained in the very short paragraphs of Sections 1464(d)(6)(C) and 1729(d):

> "The inference is irresistible that had Congress any intention of permitting FSLIC to adjudicate in its capacity as receiver, similar provisions--or provisions having a similar purpose--would have been enacted. Indeed, it is unreasonable to conclude that, although FSLIC and the Board are painstakingly circumscribed in adjudicating cases in their supervisory role, as to which their administrative expertise is greatest, neither is circumscribed in adjudicating as receiver."

The Morrison-Knudsen court then stated that it could not "sweep under the rug" the serious constitutional difficulties that attend FSLIC's assertion of adjudicatory jurisdiction. The court in looking to the substance of the rights

at issue, found it plausible that each of the creditors' claims presented a private right, and therefore, a claim assumed to be at the core of matters normally reserved to Article III courts.

As in Morrison-Knudsen, your petitioners are not asking the courts to interfere in FSLIC's duties. Everyone gave up rights under the settlement. They merely want FSLIC to honor the committment of the Bank Board and allow them to complete the project. FSLIC would then be free to take whatever steps it felt appropriate to utilize or dispose of its completed assets.

2. The standard of review

The Ninth Circuit noted the problems of determining the proper standard of appellate review of the findings by FSLIC, citing Northern Pipeline Construction Co. v. Marathon Pipe Line Co. 458 v.s. 50 (1982).

In Morrison-Knudsen the FSLIC took the position that should FSLIC have adjudicatory

power, its findings of fact would be reviewable under the "weight of the evidence" test. However, the Ninth Circuit was not sure.

> "In the absence of specific congressional direction, review would proceed according to the Administrative Procedure Act, under which the 'arbitrary and capricious' standard might well be applicable, ..., or at best the 'substantial evidence' standard, ..., which still is more deferential then 'weight of the evidence' review."

Rather than becoming involved in this potential constitutional question, the Ninth Circuit held simply that FSLIC was not given adjudicatory power by Title 12:

> "It is not necessary for us to pass on these matters. We reject FSLIC's interpretation because it raises these 'serious' constitutional difficulties, which the statutes can quite 'fairly be read' to avoid. Schor, 106 S. Ct. at 3252. It may be that with careful limitations like those governing FSLIC's adjudication of regulatory violations, Congress could have crafted an adjudicatory jurisdiction for FSLIC in its receivership capacity

> that would pass constitutional muster. We are convinced it has not attempted to do so."

3. Multiple entities

The Ninth Circuit recognized the inherent difficulties and conflicts that arise when the FSLIC is appointed receiver of a failed institution.

It noted that FSLIC is the supervisor of a failing institution; the receiver once it in fact fails; the custodian of its assets; an insurer of deposits; and thus the single largest creditor of the institution; a defendant when claims are brought against the failed institution, its officers or assets; and lastly, judge and sole finder of fact in regards to claims by and against the institution.

It is the last "hat" FSLIC sought to wear which concerned the Ninth Circuit the most. And, despite all of the other conflicts of interest and multiple personalities, it is only this last

role, that of judge, which the Ninth Circuit found to be beyond the powers of FSLIC.

Those conflicts of interest are all present in the Bonfanti-Fackrell case. The FSLIC/Bank Board was the supervisor of Sun Belt on April 29 and 30. FSLIC became the receiver of Sun Belt on May 1 and custodian of its assets on May 2. As insurer of deposits, FSLIC also became a major creditor of Sun Belt on May 2. Now the FSLIC/Bank Board is not only defendant to the claims by the unfortunate lien claimants, but FSLIC and the Bank Board will become judge of the trial court and court of appeals in determining the merits of those very claims. Surely Hudspeth did not envision creating such an overwhelming and unfair conflict of interest.

4. Delay

The main concern of the Fifth Circuit in Hudspeth and Bonfanti-Fackrell was with the delay caused by judicial determination of claims, and

the perceived adverse effect of such delay on the liquidation process. However, inordinate delay in liquidation of claims is inherent in most FSLIC receiverships. This delay was the point on which the Ninth Circuit was most critical of the Fifth Circuit's Hudspeth decision:

> "The Hudspeth court reasoned that judicial 'resolution of even the facial merits of claims...would delay the receivership function of distribution of assets' and that 'such a delay is a 'restraint' within the scope of the statute,' Hudspeth, 756 F.2d at 1102. The court held that FSLIC had exclusive original jurisdiction to adjudicate creditors claims, subject only to judicial review under the Administrative Procedure Act. Id. at 1103. We reject this reasoning.
>
> First, its logic is flawed. If judicial review, which will delay--perhaps by years--the liquidation process, does not restrain or affect a receiver, then why does initial adjudication by a court of creditors' claims do so? Hudspeth provides no answer. Section 1464(d)(6)(C) does not speak in terms of the magnitude of such restraint or effect.
>
> Second, and more important, section

> 1464(d)(6)(C) does not add to FSLIC's receivership powers; it simply prohibits courts from interfering with powers, which FSLIC must derive from other statutory sources. Thus the essential question under section 1464(d)(6)(C) is whether FSLIC's receivership 'powers or functions' include adjudication of creditor claims. Yet the Hudspeth opinion makes no reference to any statutory language or legislative history indicating a congressional intent to confer adjudicatory power upon FSLIC in its receivership capacity. What has not been conferred cannot be derived by pointing to the time consuming tasks that FSLIC as a receiver must undertake. At bottom FSLIC merely asserts that it could do its job faster and more efficiently if it had adjudicatory power. Perhaps true, but if Congress did not provide that adjudication would be among FSLIC's receivership functions the agency may not use section 1464(d)(6)(C) to achieve that result." (emphasis added).

Such delay will occur in Bonfanti-Fackrell. It has been over fifteen months since the appointment of FSLIC as receiver, but no claims have been "adjudicated" by FSLIC. Once those claims are finally determined adverse to the

claimants, the appeal will be to the Bank Board under the Administrative Procedures Act. Following that determination affirming the FSLIC, appeal will then be back to the U.S. District Court, back to the court of appeals and untimately back to this honorable court. As noted by the Ninth Circuit, such a convoluted process surely will restrain the liquidation process. Unfortunately, by that time the asset in question will no longer exist as it will have been long since condemned.

5. FSLIC as a party

The Ninth Circuit's holding was that "...FSLIC has no power to adjudicate creditor claims." (emphasis added)

Due to this holding, the Ninth Circuit summarized:

> "As receiver for failed associations, however, FSLIC stands in the shoes of the insured institution. It takes over assets and liabilties, and it

> assumes full operational control in its own name. It is empowered and indeed obliged to pay all valid depositors' and creditors' claims up to certain limits in orderly fashion and without immediate judicial supervision. It may settle or release these claims with the consent of claimant parties as it sees fit in order to accomplish this task more efficiently. But when a claim is disputed and agreement cannot be reached. FSLIC is obliged to attend court just as the institutions it represents would have had to do." (Emphasis added).

The claims of the lien claimants are indeed disputed and agreement cannot be reached. FSLIC and the lien claimants attended court, and the court ruled in favor of the lien claimants. That decision is consistent with the Ninth Circuit in Morrison-Knutsen, but directly opposite the Fifth Circuit in Hudspeth. That conflict of the circuits and the harsh result that befalls a creditor in the Fifth Circuit is the main reason writs should be granted herein.

CONCLUSION

The opinion of the Fifth Circuit in this case interpreting 12 U.S.C. 1464(d)(6)(C) and 1729(d) and Article III of the Constitution conflicts with the Morrison-Knutsen Co. v. CHG International decision out of the Ninth Circuit. In view of the rising number of thrift and savings and loan failures in this country and increasing involvement of the FSLIC, it is obvious that courts will be called upon to interpret those sections in the future. Petitioners respectfully submit that certiorari should be granted in this case to resolve the conflict in the Circuit courts regarding the scope of Sections 1464(d)(6)(C) and 1729(d) and Article III.

Also, if the Hudspeth line of cases from the Fifth Circuit is indeed the law, should the

FSLIC/Bank Board be estopped from asserting same herein due to the very unique circumstances of this particular case?

Respectfully submitted:

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RESPONDENT

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GEORGE M. BONFANTI,
GERALD E. FACKRELL, JR., ET AL.,
PETITIONERS

PROOF OF SERVICE

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

Robert V. McAnelly, after being duly sworn, deposes and says that pursuant to Rule 28 of this Court, he has served the Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit on counsel for the respondent by enclosing a copy thereof in an envelope, first class postage prepaid, properly addressed to:

1. William R. Pitts
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3. Harry W. Quillian
General Counsel,
Federal Home Loan Bank Board
1700 "G" Street, N.W.
Washington, D.C. 20552

and depositing same in the United States mail at Baton Rouge, Louisiana, on the _____ day of August, 1987.

_____
ROBERT V. McANELLY

Sworn to and subscribed before me, this _____ day of August, 1987, at Baton Rouge, Louisiana

_____
NOTARY PUBLIC
My Commission is for Life.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-3012

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION As Receiver of Sun Belt Federal Bank, F.S.B.,

Plaintiff-Apellant,

versus

GEORGE M. BONFANTI, GERALD E. FACKRELL, JR., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the

Middle District of Louisiana

(CA-85-903-B)

(May 8, 1987)

Before GOLDBERG, POLITZ, and HILL, Circuit Judges.
ROBERT M. HILL, Circuit Judge:

The Federal Savings and Loan Insurance Corporation (FSLIC), acting as receiver for Sun Belt Federal Bank, F.S.B. (Sun Belt), appeals the district court's order requiring it to carry out prereceivership settlement agreement between Sun Belt and several other parties. For the reasons given below, we reverse and remand with instructions to dismiss for lack of subject matter jurisdiction.

I.

In 1984 Sun Belt made substantial construction loans for two real estate developments in Baton Rouge, Louisiana. The borrowers failed to repay the loans and the two real estate projects were not completed. As can be imagined, numerous lawsuits arose out of these delinquencies.

Several unpaid contractors and materialmen filed suit in Louisiana state courts against the borrowers for payment of services rendered and for materials supplied. The borrowers led by George Bonfanti and Gerald Fackrell filed suit in

Louisiana state court against Sun Belt for breach of contract.[1] The instant federal case began when Sun Belt filed suit aginst Bonfanti, Fackrell, and others alleging fraudulent diversion of loan proceeds, breach of contract, and violations of federal law. In an attempt to resolve all the disputes arising out of the loans and real estate projects, the district court convened a settlement conference between Sun Belt, the borrowers and other persons and entities claiming an interest in the entire affair. The settlement discussions therefore included persons and

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1. During this eruption of lawsuits one of the borrowers, "BFC-8" also filed for relief under the United States Bankruptcy Code.

entities not parties to Sun Belt's federal action. After lengthy negotiations, a settlement agreement was achieved. In general the settlement provided that Sun Belt would receive title to the real estate projects and that the lienholders on the projects would release their claims for partial payments made by Sun Belt. In regard to Jefferson Lakes Apartments, the settlement provided that Sun Belt could complete it and that the building lienholders would perform the work on agreed upon terms. In regard to Essen Center, Sun Belt was obligated to complete the outer construction for $850,000. In December 1985 the district court approved the agreement.

Partial performance of the agreement occurred. Sun Belt received title to one of the projects, Jefferson Lakes, and made the requisite payment to the lienholders who then released their claims. On May 1, 1986, Sun Belt signed a 5.5 million dollar contract with the original

contractors of the Jefferson Lakes project for completion of the project. But again the project would not meet with success.

On the same day the construction contract was signed, the Federal Home Loan Bank Board (the Bank Board) determined that Sun Belt was insolvent. The Bank Board appointed the FSLIC receiver for Sun Belt. Upon learning of the May 1st contract for the Jefferson Lakes project, the FSLIC notified the contractors not to begin work.

In late May 1986 the district court held a status conference to determine whether the settlement agreement was being performed. The FSLIC at this point asserted that the district court no longer had jurisdiction to enforce the settlement or adjudicate claims arising from it, and, accordingly, moved to dismiss the case. Other adherents to the settlement requested the district court hold FSLIC in contempt for failing to perform the settlement. In December 1986 the district court denied the receiver's motion to

dismiss and ordered it to comply with the settlement, namely to complete the Jefferson Lakes project. The FSLIC perfected a timely appeal to this court.[2] We have jurisdiction pursuant to 28 U.S.C. Sec. 1291, 1292 (a) (1).

II.

This case is controlled by the broad powers bestowed upon a receiver of an insolvent financial institution by Congress. Title 12 U.S.C. Sec. 1464 (d) (6) (C) provides that "no court may . . . restrain or affect the exercise of power or function of a conservator or receiver" Likewise, Congress has provided that

> In connection with the liquidation off insured institutions in default, the receiver shall have power . . . to settle, compromise, or release claims

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2 On January 8, 1987, we stayed the district court's December 1986 order and expedited the consideration of this appeal.

> in favor of or against the injured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the . . . other public authority having jurisdiction over the matter.

12 U.S.C. Sec. 1729 (d).

We have interpreted these sections as divesting federal courts of subject matter jurisdiction over all claims against thrift receiverships until the administrative claims process involving those claims is completed. See North Mississippi Savings & Loan Ass'n v. Hudspeth, 756 F. 2d 1096, 1102 (5th Cir. 1985), cert. denied, 106 S. Ct. 790 (1986); see also Chupik Corp. v. Federal Savings & Loan Insurance Corp., 790 F.2d 1269 (5th Cir. 1986). In formulating this divestive rule, we stated in Hudspeth:

> Congress wanted the FSLIC to be able to act quickly and decisively in reorganizing, operating, or dissolving

> a failed institution, and intended that the FSLIC's ability to accomplish these goals not be interfered with by other judicial or regulatory authorities.

756 F.2d at 1101. Furthermore, in Chupik we emphasized the breadth of section 1464's language and Hudspeth's holding by stating:

> [W]e re-emphasize that "resolution of even facial merits of claims outside the statutory reorganization process" is a "restraint" with the scope of section 1464 and thus is to be avoided.

790 F.2d at 1270 (citing Hudspeth, 756 F.2d at 1102).

To restate yet again, upon the appointment of a receiver, herein the FSLIC, all claims against the insolvent thrift, herein Sun Belt, are "switched to the administrative track, pursuant to 12 U.S.C. Sec. 1464(d) (6) (C)", Hudspeth, 756 F.2d at 1103, and a federal court loses subject matter jurisdiction over the claims.

The FSLIC has begun the administrative process on claims asserted against Sun Belt. That process is not yet complete and upon completion is subject to review by the Bank Board and ultimately a federal court. In light of Hudspeth, the district court erred in denying FSLIC's motion to dismiss. Accordingly, we reverse that decision and remand with instructions to dismiss this action.

III.

Hudspeth is too clear -- there are no end runs around the receiver's broad realm of authority. That realm of authority includes the initial administrative evaluation of claims asserted against it or the insolvent thrift.[3] For these reasons, the district court's order is reversed and the cause remanded with instructions to dismiss for lack of jurisdiction.

REVERSED and REMANDED.

3

We are aware that the Ninth Circuit in Morrison-Knudson Co. Inc. v. CHG International, Inc., 811 F.2d 1210 (9th cir. 1986) (pet. for rehearing pending), rejected Hudspeth. Morrison-Knudsen simply refused to follow Hudspeth's holding and cited no intervening Supreme Court precedent as guiding its choice of position. We have found no Supreme Court precedent that brings Hudspeth into question; we therefore are bound to follow it as a prior decision of our court regardless of the Morrison-Knudsen decision.

APPENDIX "B"

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

SUN BELT FEDERAL BANK,F.S.B.

versus

GEORGE M. BONFANTI, GERALD E. FACKRELL,JR.,BFC-8 LTD., BONFANTI-FACKRELL HOLDING CORP., LARRY TULLOS, JOHN GRAVES, JAMES DODDS, and HARRY ADCOCK

JUDGMENT

Pursuant to stipulation of counsel dictated into the record of this Court on December 23, 1985, and the evidence, affidavit and stipulations of counsel presented in Open Court on December 19, 1986:

IT IS ORDERED, ADJUDGED AND DECREED THAT:

I. The Motion Regarding Lack of Subject Matter Jurisdiction filed by the Federal Savings and Loan Insurance Corporation as Receiver of Sun Belt Federal, F.S.B. is hereby denied.

II. There be Judgment herein in conformity with said stipulation as dictated into the record of this Court on December 23, 1985, a copy of the said stipulation is attached hereto as Exhibit "A"; and all parties, including the Federal Savings and Loan Insurance Corporation in its capacity as Receiver of

Sun Belt Federal Bank,F.S.B., are ordered to comply with the provisions of this Judgment. JUDGMENT READ, RENDERED AND SIGNED in Open Court, this 5th day of January, 1987, at Baton Rouge, Louisiana.

/s/ Frank J. Polozola
JUDGE,U.S. DISTRICT COURT,
FOR THE MIDDLE
DISTRICT OF LOUISIANA

EXHIBIT "A"
(TO APPENDIX "B")

I. ESSEN CENTRE

A. A joint plan of bankruptcy will be filed in the BFC-8, Ltd. Chapter XI proceeding by Sun Belt, BFC 8, Ltd., and the lien holders essentially presenting a plan as follows:

1. Title to Essen Centre will be vested in Sun Belt or its nominee at no cost to Sun Belt.

2. Sun Belt will pay all claimants, subject to a maximum of $1.3 million, with 70% payable upon a final, definitive judgment confirming the bankruptcy plan and the other 30% payable in three equal installments during construction of the shell, the 30% will be secured by a mortgage on Essen Centre.

3. Lien holders will agree to complete the shell for a maximum of $825,000.00., said price to be guaranteed by Dr. Zohdi and the Standard Naylor Group, Inc. Any amount which Sun Belt must pay in excess of $825,000.00 will be deducted from the 30% payable to lien holders referred in (A)(2) above. Contractors will be a joint venture between

Quality Contracting and Standard Naylor Group, Inc. and/or their assigns.

4. Bonfanti-Fackrell will transfer ownership of the land on which the parking garage encroaches to Sun Belt or its designee, at no cost to Sun Belt.

5. Sun Belt will pay American Bank $70,000.00, and in consideration, will recieve a release of American Bank's and Metropolitan's mortgages; the $70,000.00 will be credited by American Bank to any claim it has against Sun Belt and to any claim it has against BFC-8, Limited.

6. Capital Holding Corporation will receive a release of any claims of BFC-8, Ltd. for recovery of payments previously made, and in consideration, Capital Holding will release all claims for any penalties under the bond issue. If Capital Holding refuses to vote for the plan, its claim will be valued on a liquidation basis, and it will receive the above referred to release, or the value of its claim, whichever is of greater value, subject to the condition referred to below in No. 9.

7. Any payments to the lien

holders, American Bank, and Capital Holding Corporation by Sun Belt, will be funded by means of a super priority, first mortgage at competitive interest rates, to which the existing Sun Belt mortgage will be subordinated.

8. All other liens and encumbrances will be cancelled at the time the property is transferred.

9. The plan will be conditional upon Sun Belt or its nominee getting title free and clear of all encumbrances other than the Sun Belt mortgages, and the mortgage to lien holders securing payment of the 30% remaining on the lien payments, and upon a finding by the Court that the value of Capital Holding's claim is less than $1,000.

B. BFC 8, Ltd. will record a notice of abandonment immediately.

C. As a condition predicate to payment to lien holders, all lien holders must release Sun Belt and its prior and present officers, employees, and directors from any claims arising out of the Essen Centre project.

II. JEFFERSON LAKES

A. Title to Jefferson Lakes will be transferred from the existing owners

to Sun Belt and/or its nominee at no cost to Sun Belt. (This has been done.)

B. The transfer will be executed via dations en paiement or a friendly foreclosure, at Sun Belt's option. (This has been done.)

C. All lien holders will release all liens on the project and will furnish a clear lien certificate to Sun Belt, and in consideration for which Sun Belt will pay lien holders $1,200,000, payable as follows:

1. $900,000 cash to be made payable to lien holders and their attorneys at the sheriff's sale or, payable as provided in II(G) below; (This has been done)

2. $300,000 to be paid upon completion of the project, assuming lien holders complete the Jeffersson Lakes project for $5,500,000. The $300,000 will be secured by a mortgage on Jefferson Lakes; provided that nothing herein obligates Sun Belt to finish the project; however, if Sun Belt sells the project before completion, lien holders will be paid their $300,000 upon sale, assuming Sun Belt has not spent in excess of $5.5 million at that time. The contractors on Jefferson Lakes to complete the project will be a joint venture between Quality

Construction and Standard Naylor and/or their assigns.

3. In the event the project is completed for more than $5.5 million, the $300,000 will be reduced, dollar for dollar, for any amount which Sun Belt must pay in excess of $5.5 million to complete the project; and

4. All laborers who have liens on the Jefferson Lakes project will receive 50% of the amount of their liens up to a maximum of $40,000 (from the $900,000 enumerated in II(C) to be divided equitable amount them by their attorneys.

D. At the request of Sun Belt, Dr. Zohdi and Standard Naylor Group, Inc., will guarantee the construction cost to finish Jefferson Lakes for $5.5 million.

E. The owners of Jefferson Lakes will immediately file a notice of abandonment.

F. The lien holders have an option to buy Jefferson Lakes pursuant to the terms of the agreement offered to the lien holders on December 3, 1985. That option shall lapse on June 30, 1986. If that option is not exercised by the lien holders, Bonfanti and Fackrell shall have an option to purchase the property pursuant to an agreement executed by the parties on 12/19/85.

In any event, all options to both lien holders and Bonfanti-Fackrell, if not exercised by June 30, 1986, will expire.

G. Payment to the lien holders will be made on the earlier of (1) thirty days after the notice of abandonment; provided that lien holders have provided a clear lien certificate and complied with all terms of this agreement by that time; or (2) the sheriff's sale, which shall be set as soon as possible. (This has been done.) The $900,000 will be secured by either Sun Belt's letter of credit or a mortgage on the Jefferson Lakes' property, to which Sun Belt will subordinate its mortgages, at the option of lien holders.

H. The lien holders will release the record owners of Jefferson Lakes from any and all lien claims or any other personal liability which they may have arising under state or federal law.

I. The lien holders will release Sun Belt and its present and prior employees, officers, and directors against all claims arising out of the Jefferson Lakes project.

J. The lien holders agree to release all claims against any bond companies of any other lien holders on Jefferson Lakes. Southern Electric Supply, Inc. of Delaware reserves its right under open account against C & C Electric of Baton Rouge, Inc.

K. In the event there are any lien holders who refuse to comply with the terms of this agreement and/or who refuse to execute the releases provided for herein, and provided there is joint consent of Sun Belt Savings Bank and the record owners of Jefferson Lakes, the Jefterson Lakes property will be sold at sheriff's sale, and none of the proceeds of the sale, nor any amount of the $1.2 million payable by Sun Belt shall be paid to such lien holders.

III. TERMINATION OF LITIGATION AND RELEASE OF ALL CLAIMS

Contingent upon confirmation of the bankruptcy plan outlined above and contingent upon the occurrence of the Jefferson Lakes settlement, the following claims and litigation will be released:

A. CLAIMS

1. All defendants in the Federal Civil RICO suit will dismiss Sun Belt, its agents, officers, directors, employees, and attorneys from any claims arising out of the RICO suit, including, but not limited to, actions for defamation, malicious prosecution, loss of business, etc.

2. Bonfanti, Fackrell, the Baums, Stewart, all related Bonfanti-Fackrell entities, Sun Belt, and its related and subsidiary companies will release all claims against each other and against any lien holders.

3. All lien holders on Essen Centre and Jefferson Lakes will release all claims against Bonfanti, Fackrell, the Baums, Stewart, all related Bonfanti-Fackrell Companies, Sun Belt and its related companies, as well as Sun Belt's present and prior management; provided that, however, not withstanding anything contained in this paragraph or in any other portion of this agreement, J. F. Naylor Company, Inc. Reserves its rights against prior Sun Belt management and other parties as set forth in an agreement between Naylor and Sun Belt dated December 23, 1985, incorporated herein by reference.

B. LITIGATION

Contingent upon the above claims being dismissed, the following litigation will be dismissed:

1. Sun Belt's litigation against James Dodds, BFC 8, Ltd., Noel B. Baum, Janet Ferracci Baum, V. James Stewart, Gerald Fackrell, George Bonfanti, and any related Bonfanti-Fackrell entity will be dismissed with prejudice;

2. Sun Belt's pending litigation against Harry Adcock will be dismissed without prejudice and against Larry Tullos will be dismissed with prejudice;

3. Bonfanti, Fackrell, the Baums,

Stewart, and all present or prior related Bonfanti-Fackrell entities will release with prejudice all litigation against Sun Belt, its related or affiliate companies, and against all lien holders; and

4. lien holders on both Essen Centre and Jefferson Lakes will dismiss with prejudice any existing litigation against Sun Belt, its related and subsidiary companies, the record owners of Essen Centre and Jefferson Lakes, all Bonfanti-Fackrell related companies and other lien holders arising out of the Essen Centre and Jefferson Lakes projects; provided that, however, J.F. Naylor Bros. Company, Inc. and LCR Corporation agree that any rights flowing from the personal guarantees executed by Rusty Wharton and Tom Iglehart will remain in full force and effect. Any claim of LCR corporation shall be reduced by the amounts received by them by virtue of them being a lien holder.

IV. ADDITIONAL MATTERS

additional matters will be governed by the agreement executed between the Bonfanti-Fackrell interest and Sun Belt on 12/19/85.

V. APPROVAL OF THE FEDERAL HOME LOAN BANK BOARD

Sun Belt's ability to comply with this agreement is subject to approval by the Federal Home Loan Bank Board which was granted on December 23, 1985, at 9:00 A.M.

J.F. Naylor Bros. Company, Inc.'s compliance is subject to approval of the United States Bankruptcy Court.

(2)

No. 87-255

Supreme Court, U.S.
FILED
OCT 2 1987
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1987

MAGD E. ZOHDI, ET AL., PETITIONERS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR SUN BELT FEDERAL BANK, F.S.B.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

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30pp



QUESTION PRESENTED

Whether claims against the assets of an insolvent, federally-insured savings and loan association must be presented in the first instance in federal receivership proceedings in accordance with the Federal Home Loan Bank Board's regulations for the administrative resolution of such claims.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 826 F.2d 1391. The judgment of the district court (Pet. App. A11-A22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1987. The petition for a writ of certiorari was filed on August 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 5(d)(6)(C) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(d)(6)(C), provides:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver [appointed by the Fed-

eral Home Loan Bank Board], or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

Section 5(d)(11) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(d)(11), provides:

> The Board shall have power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations, for the merger of associations with associations or with any institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, for associations in conservatorship and receivership, and for the conduct of conservatorships and receiverships; and the Board may, by regulation or otherwise, provide for the exercise of functions by members, directors, or officers of an association during conservatorship and receivership.

Section 406(d) of the National Housing Act, 12 U.S.C. 1729(d), provides:

> In connection with the liquidation of insured institutions, the [Federal Savings and Loan Insurance] Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

Pertinent regulations of the Federal Home Loan Bank Board provide in relevant part (12 C.F.R. 549.4):

> (a) When directed to do so by the [Bank] Board, the receiver shall promptly publish a notice to the association's creditors to present their claims, with proof thereof, to the receiver by a date specified in the notice * * *. Claims filed after the specified date shall be disallowed, except as the [Bank] Board may approve them for whole or part payment from the association's assets remaining undistributed at the time of approval. The receiver shall mail a similar notice to any creditor shown on the association's books at the creditor's last address appearing thereon.
>
> (b) The receiver shall allow any claim seasonably received and proved to its satisfaction. The receiver may wholly or partly disallow any creditor claim or claim of security, preference, or priority not so proved, and shall notify the claimant of the disallowance and the reason therefor. * * * Unless, within 30 days after notice is mailed, the claimant files a written request for payment regardless of the disallowance, disallowance shall be final, except as the [Bank] Board may otherwise determine.

STATEMENT

This case arises from the decision by the Federal Home Loan Bank Board (Bank Board) to appoint the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for Sun Belt Federal Bank, F.S.B., a federally-chartered and federally-insured savings and loan institution. FSLIC appealed the district court's order requiring it to carry out the specific terms of a court-approved pre-receivership agreement between Sun Belt and several other entities. The court of appeals held that the district court lost jurisdiction over the case once FSLIC was appointed

receiver for Sun Belt and that petitioners' claims against the receivership had to be presented to FSLIC and the Bank Board for initial resolution. Petitioners seek review of the court of appeals' decision that creditors of failed savings and loan associations for which the Bank Board has appointed FSLIC as receiver are required by the Bank Board's statutes and regulations to exhaust the agency's mandatory administrative procedures for the initial resolution of creditor claims. Before turning to the specific facts of this case, we briefly describe the applicable statutory and regulatory framework.

1. *The Statutory and Regulatory Scheme.* The Bank Board is an independent agency in the Executive Branch of the United States organized pursuant to the Federal Home Loan Bank Act, 12 U.S.C. (& Supp. III) 1421 *et seq.* Congress has vested the Bank Board with broad discretionary powers over the operation of the savings and loan industry in order to maintain the financial stability of that industry and to protect the depositors of savings and loan institutions. 12 U.S.C. (& Supp. III) 1421-1449, 1461-1468. Pursuant to its statutory authority, the Bank Board "has promulgated regulations governing 'the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.' " *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 145 (1982) (citation omitted).

The Bank Board is also the operating head of FSLIC, a corporate governmental agency that is responsible, pursuant to Title IV of the National Housing Act, 12 U.S.C. 1724 *et seq.*, for insuring the accounts of all federally-chartered savings and loan associations and most state-chartered savings and loan associations. 12 U.S.C. 1725(a), 1726, 1729(c); 12 C.F.R. 500.4. The Bank Board is empowered to appoint FSLIC as conservator or receiver for a federally-chartered savings and loan association, ex

parte and without prior court approval, upon a finding that one or more of five conditions specified in 12 U.S.C. (Supp. III) 1464(d)(6)(A) exists.

When the Bank Board appoints FSLIC as receiver of a failed institution, FSLIC is empowered by statute to liquidate the assets of the institution in an orderly manner. 12 U.S.C. 1729(b)(1)(A)(v) and (c)(1)(A). In its separate corporate capacity as insurer of depositors' accounts, FSLIC must pay insured depositors "as soon as possible" after an institution's default (12 U.S.C. 1728(b)), and FSLIC typically does so within days. When, as in the instant case, FSLIC cannot find an acquirer for the failed thrift, it must either pay out the insured deposits in cash or transfer the accounts to another institution along with sufficient cash or other consideration for assumption of the deposit liabilities. The consideration for this assumption of insured deposits comes from FSLIC's very limited insurance reserves; FSLIC, like any other creditor of the association, then must seek to recoup its insurance payments from the assets of the failed institution.

In its capacity as a federal liquidating receiver appointed by the Bank Board, FSLIC acts much like a bankruptcy trustee, marshalling the assets of the institution and paying "all valid credit obligations" to the extent of available assets and according to the priorities of the obligations. 12 U.S.C. 1729(b)(1)(B); 12 C.F.R. 549.4, 569a.7-569a.8. Thus, FSLIC's duties as receiver include responsibility for considering and accepting, compromising, or rejecting all claims against the assets of the association, "subject only to the regulation of the [Bank Board]." 12 U.S.C. 1729(d). To ensure the expeditious resolution in a single forum of all claims against a failed institution for which FSLIC has been appointed receiver, Congress further provided that "no court may * * *, except at the instance of the [Bank] Board, restrain or affect the exercise of powers or functions of a conservator or receiver." 12 U.S.C. 1464(d)(6)(C).

In accordance with these statutory provisions, and in furtherance of its power to "make rules and regulations * * * for the conduct of conservatorships and receiverships" (12 U.S.C. 1464(d)(11)), the Bank Board has promulgated regulations establishing an administrative claims procedure governing the presentation, allowance and payment, or disallowance of claims against the assets of a failed institution. 12 C.F.R. 549.4, 549.5, 549.5-1, 569a.7, 569a.8, 569a.9. The Bank Board's regulations, which have been in existence since 1956 (see 24 C.F.R. 149.4 (1956)), vest in FSLIC as receiver the exclusive authority to consider claims against a failed federally-chartered institution in the first instance. The regulations require the receiver to publish a notice to creditors, specifying a date by which claims must be filed, and to mail a similar notice to creditors shown on the books of the association. 12 C.F.R. 549.4(a). The regulations further provide that the "receiver shall allow any claim seasonably received and proved to its satisfaction." 12 C.F.R. 549.4(b). Claims allowed by the receiver are to be paid to the extent that funds are available. 12 C.F.R. 549.4(d).[1]

The receiver may also wholly or partly disallow any claim not proved to its satisfaction, but it must give the claimant notice of the disallowance and the reasons therefor. 12 C.F.R. 549.4(b). The claimant may ask the Bank Board to review the receiver's determination, and the Bank Board, acting pursuant to established procedures, may decide to allow a claim that the receiver has disallowed. 12 C.F.R. 549.4(b) and (c). If the Bank Board

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[1] After Congress amended the National Housing Act to give the Bank Board authority to appoint FSLIC as receiver for state-chartered institutions, the Bank Board promulgated similar regulations in 1968 to govern claims against the assets of failed state-chartered thrifts in federal receivership (see 12 C.F.R. Pt. 569a). See *North Mississippi Savings & Loans Ass'n* v. *Hudspeth*, 756 F.2d 1096, 1101 (5th Cir. 1985), cert. denied, 474 U.S. 1054 (1986).

denies a claim, the claimant may seek judicial review of the Bank Board's decision. See *North Mississippi Savings & Loan Ass'n* v. *Hudspeth*, 756 F.2d 1096, 1103 (5th Cir. 1985), cert. denied, 474 U.S. 1054 (1986).

2. *The Hudspeth and Morrison-Knudsen Decisions.* In *North Mississippi Savings & Loan Ass'n* v. *Hudspeth, supra,* the Fifth Circuit considered the application of the statutory and regulatory scheme described above to a counterclaim for specific performance and damages under a deferred compensation agreement brought by the ex-president of a savings and loan association that was later placed in a FSLIC receivership. The Fifth Circuit affirmed the district court's grant of FSLIC's motion to dismiss, holding that Hudspeth's claims were "switched to the administrative track" by virtue of 12 U.S.C. 1464(d)(6)(C) and 1729(d). *Hudspeth*, 756 F.2d at 1103.

After examining the language and legislative history of the Bank Board's statutes and regulations, the Fifth Circuit held that Hudspeth's breach of contract claim could not be presented in the district court in the first instance. Although the Fifth Circuit concluded that Hudspeth was free to challenge the receiver's disposition of his claim before the Bank Board and, if dissatisfied with the Bank Board's resolution, in district court under the Administrative Procedure Act, the court concluded that the statutory and regulatory scheme totally ousted the courts from making the initial determination of the validity of the claim (756 F.2d at 1102):

> [R]esolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets: the FSLIC would not be able to determine how much to pay other claimants until the termination of the parallel litigation. Given the overriding Congressional purpose of expediting and facilitating the FSLIC's task as receiver, such a delay is a "restraint" within the scope of the statute.

The Fifth Circuit reaffirmed *Hudspeth* in its decision in this case and in *Chupik Corp.* v. *FSLIC*, 790 F.2d 1269 (1986). The Ninth Circuit, however, expressly rejected *Hudspeth* in *Morrison-Knudsen Co.* v. *CHG International, Inc.*, 811 F.2d 1209 (1987), petition for cert. pending *sub nom. FSLIC* v. *Stevenson Associates*, No. 87-451 (filed Sept. 17, 1987). In *Morrison-Knudsen*, the court of appeals refused to require creditors to present their claims against failed thrifts for initial resolution in the federal receivership proceedings. Notwithstanding the court's express recognition of the validity of the Bank Board's regulations creating the administrative claims procedure (*Morrison-Knudsen*, 811 F.2d at 1217), the Ninth Circuit was of the view that neither the Bank Board's statutes nor its implementing regulations grant FSLIC as receiver the power to render "adjudicative" decisions. *Id.* at 1216-1219.

Based on this view of FSLIC's powers, the Ninth Circuit concluded in *Morrison-Knudsen* that creditors of a failed savings and loan association may assert claims against the assets of the institution in state or federal court without exhausting the administrative remedies contained in the Bank Board's regulations. 811 F.2d at 1222. The court did suggest that trial courts, in their discretion, may compel a creditor to present its claim to FSLIC as receiver before seeking judicial resolution of the claim. *Id.* at 1223-1224. However, a decision to require exhaustion would be based on an ad hoc balancing of competing interests, rather than on the Bank Board's mandatory exhaustion regulations. *Ibid.*

3. *The Facts of this Case.* In 1984, Sun Belt made two large loans secured by mortgages for real estate projects in Baton Rouge, Louisiana. Pet. App. A2. By July 1985, the borrowers had exhausted the loan funds without completing the real estate projects and had defaulted on their loan payments. *Ibid.* A spate of litigation and other legal maneuvering then ensued.

Numerous unpaid contractors, materialmen, and laborers recorded lien claims relating to each real estate project. Sun Belt and the borrowers filed suits against each other in state court, with Sun Belt seeking to foreclose its mortgages on the two properties and collect on the loans and the borrowers alleging breach of contract. Pet. App. A3. (One of the borrowers also filed for reorganization under the Bankruptcy Code. *Id.* at A3 n.1.)

In addition, on September 30, 1985, Sun Belt initiated the present action in the United States District Court for the Middle District of Louisiana against some of the borrowers, alleging diversion of loan funds from the two construction projects, breach of contract, and violations of federal law. Pet. App. A3. The various unpaid contractors, materialmen, and lienholders were not parties to this action.

In December 1985, the district court instituted settlement discussions extending beyond the parties and matters involved in the federal court action. Pet. App. A3. Thus, the district court convened and presided over conferences that included not only Sun Belt and the borrowers, but also the unpaid contractors, materialmen, and laborers, and the parties to the state court litigation and the bankruptcy proceedings. On December 23, 1985, the district court held a hearing and read into the record a settlement agreement intended to resolve all disputes arising out of the loan delinquencies. See Pet. App. A13-A22. The court of appeals summarized the agreement as follows (*id.* at A4):

> [T]he settlement provided that Sun Belt would receive title to the real estate projects and that the lienholders on the projects would release their claims for partial payments made by Sun Belt. In regard to Jefferson Lakes Apartments, the settlement provided that Sun Belt could complete it and that the building lienholders would perform the work on agreed upon terms. In regard to Essen Center, Sun Belt was obligated to complete the outer construction for $850,000.

Because of its precarious financial position, Sun Belt was at the time of the settlement discussions operating under a Consent Agreement with the Bank Board that required the Board's approval for any major undertaking. On December 23, 1985, Sun Belt sought and received consent from the institution's Supervisory Agent to enter into the settlement agreement. Thereafter, the district court issued a minute order approving the agreement, and, on January 6, 1986, the court entered an order dismissing Sun Belt's lawsuit.

Between December 23, 1985 and May 1, 1986, the parties accomplished several of the transactions provided for in the settlement agreement. Sun Belt received title to one of the real estate projects, and it made the requisite payment to the lienholders who then released their claims. Pet. App. A4. On May 1, 1986, Sun Belt signed a $5.5 million contract with the original contractors for the Jefferson Lakes Apartments project for completion of the project. *Id.* at A4-A5.

Also on May 1, however, the Bank Board determined that Sun Belt was insolvent. Pet. App. A5. Based on that determination, the Bank Board exercised its statutory authority (12 U.S.C. (Supp. III) 1464(d)(6)(A)) to appoint FSLIC as receiver for Sun Belt. On May 2, the receivership staff took possession of Sun Belt. On May 3, the receivership staff and the receiver's counsel, upon learning of the just-signed $5.5 million construction contract, immediately notified the contractor not to begin work. Pet. App. A5.

Later in May 1986, the district court held a status conference to determine whether the pre-receivership settlement agreement was being executed. FSLIC as receiver for Sun Belt advised the district court of its position that the creation of the receivership had divested the court of jurisdiction to enforce the agreement against FSLIC as receiver or to adjudicate claims arising from the agreement. Pet. App. A5. Several months later, other parties to the settlement (who had not formally intervened in the federal court action) moved for an order to show cause

why FSLIC as receiver should not be held in contempt for failing to fulfill all of Sun Belt's obligations under the agreement. *Ibid.*

On December 19, 1986, the district court issued an order denying FSLIC's motion to dismiss the case for lack of jurisdiction and compelling FSLIC to comply with the pre-receivership settlement agreement by, inter alia, completing the Jefferson Lakes project. Pet. App. A6. The district court stated that, if neeessary, it would enforce its ruling through criminal contempt proceedings. R.E. at D3.[2]

Subsequently, the district court offered three reasons for its ruling: (1) the persons and entities involved in the dispute, many of whom had had no direct contacts with Sun Belt, had changed their position in reliance on the pre-receivership settlement agreement; (2) the Supervisory Agent had acquiesced in the pre-receivership settlement and in the Jefferson Lakes construction contract; and (3) it would violate Article III of the Constitution to construe the Bank Board's appointment of FSLIC as receiver for Sun Belt as an event divesting the district court of subject matter jurisdiction. R.E. at D4 to D7, D11 to D15, D17 to D18, D24, D26 to D27.

The court of appeals granted a stay pending appeal of the district court's order requiring FSLIC's compliance with the pre-receivership agreement. Pet. App. A6 n.2. Thereafter, the court of appeals reversed, holding that the appointment of FSLIC as receiver for Sun Belt divested the district court of "subject matter jurisdiction over all claims against thrift receiverships until the administrative claims process involving those claims is completed." *Id.* at A7. The court of appeals elaborated on its reaffirmation

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[2] "R.E." denotes the Record Excerpts filed by FSLIC in the court of appeals.

of the *Hudspeth* doctrine (Pet. App. A8-A9 (footnote omitted)):

> To restate yet again, upon the appointment of a receiver, herein the FSLIC, all claims against the insolvent thrift, herein Sun Belt, are "switched to the administrative track," pursuant to 12 U.S.C. Sec. 1464(d)(6)(C), *Hudspeth*, 756 F.2d at 1103, and a federal court loses subject matter jurisdiction over the claims.
>
> The FSLIC has begun the administrative process on claims asserted against Sun Belt. That process is not yet complete and upon completion is subject to review by the Bank Board and ultimately a federal court.
> * * *
>
> *Hudspeth* is too clear—there are no end runs around the receiver's broad realm of authority. That realm of authority includes the initial administrative evaluation of claims asserted against it or the insolvent thrift.

The court of appeals therefore remanded the case to the district court with instructions to dismiss for lack of jurisdiction. Pet. App. A9. Petitioners ask this Court to review that decision.[3]

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[3] We note that petitioners are the contractors and others with whom Sun Belt had arranged for the $5.5 million construction contract for the Jefferson Lakes Apartments project. Although petitioners were not formal parties to this case, they were the entities that requested enforcement of the pre-receivership agreement by the district court. See pages 10-11, *supra*. Since that time, they have been treated as de facto parties by the district court and the court of appeals. We have therefore amended the caption of the case in this Court to reflect that they are the actual petitioners. The borrowers (George Bonfanti and related entities), although identified by the caption on the petition as the petitioners in this Court, in fact were not the real parties in interest in the courts below, nor have they sought review in this Court.

DISCUSSION

The Fifth Circuit's decision in this case reaffirms what we submit is a sensible, well established, and congressionally mandated Bank Board practice. Adhering to its previous decision in *Hudspeth,* the court holds that once the Bank Board appoints FSLIC as receiver for an insolvent thrift, all of the thrift's creditors must present their claims to FSLIC for initial determination and then, if the claim remains in dispute, exhaust the Bank Board's administrative remedies before seeking judicial relief. That decision, though correct, conflicts with the Ninth Circuit's decision in *Morrison-Knudsen,* which holds that a creditor is not required to present its claim for initial administrative resolution before invoking a court's jurisdiction. Under the Ninth Circuit rule, a trial court may require a claimant to exhaust the Bank Board's administrative remedies purely as a matter of discretion, to be decided in each case according to an ad hoc balancing of interests. See 811 F.2d at 1223-1224.

The conflict in the circuits presents a question of substantial practical importance for the orderly and efficient administration of all FSLIC receiverships. This petition presents the issue to the Court for the first time since the square conflict developed. We therefore submit that the Court should grant review limited to the question of exhaustion.[4]

1. The conflict in the circuits demands resolution by this Court.[5] FSLIC cannot sensibly administer federal

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[4] Since the filing of the instant petition, the government has filed petitions for a writ of certiorari in *Morrison-Knudsen* and a subsequent Ninth Circuit case following *Morrison-Knudsen. FSLIC* v. *Stevenson Associates,* No. 87-451 (filed Sept. 17, 1987); *FSLIC* v. *Murdock-SC Associates,* No. 87-452 (filed Sept. 17, 1987). We have asked the Court to hold those petitions for disposition as appropriate in light of the Court's disposition of the instant petition.

[5] In its decision in this case, the Fifth Circuit expressly declined to revisit *Hudspeth* in light of *Morrison-Knudsen.* Pet. App. A10 n.3. Moreover, the federal district courts have overwhelmingly endorsed

receiverships under a system that permits creditors in California to bypass the administrative procedure established to resolve their claims while requiring creditors in Texas to pursue statutorily-mandated exhaustion procedures before resorting to judicial review. A single failed institution for which the Bank Board appoints FSLIC as receiver may have creditors across the country.[6] Thus, the efficient administration of the approximately 60 FSLIC receiverships now in existence is threatened by the possibility that one or more creditors may file suit in a

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the Fifth Circuit's construction of FSLIC's governing statutes and regulations. See, *e.g.*, *Acquisition Corp. of America* v. *Sunrise Savings & Loan Ass'n*, 659 F. Supp. 138 (S.D. Fla. 1987); *FSLIC* v. *Oldenburg*, 658 F. Supp. 609 (D. Utah 1987); *FSLIC* v. *Hall Whispertree Associates*, 653 F. Supp. 148 (N.D. Tex. 1986); *First Financial Savings & Loan of El Dorado* v. *FSLIC*, 651 F. Supp. 1289 (E.D. Ark. 1987); *Kohlbeck* v. *Kis*, 651 F. Supp. 1233 (D. Mont. 1987); *FSLIC* v. *Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987); *Baer* v. *Abel*, 649 F. Supp. 25 (W.D. Wash. 1986); *Baer* v. *Abel*, 648 F. Supp. 69 (W.D. Wash. 1986); *Colony First Federal Savings & Loan Ass'n* v. *FSLIC*, 643 F. Supp. 410 (C.D. Cal. 1986); *Sunrise Savings & Loan Ass'n* v. *LIR Development Co.*, 641 F. Supp. 744 (S.D. Fla. 1986); *Politser* v. *Rosch*, No. 86-C-0776 (N.D. Ill. June 25, 1986); *Manning Savings & Loan Ass'n* v. *Federal Home Loan Bank Board*, No. 83-C-757 (N.D. Ill. Jan. 4, 1984); *First Savings & Loan Ass'n* v. *First Federal Savings & Loan Ass'n*, 531 F. Supp. 251 (D. Haw. 1981). See also *Lyons Savings & Loan Ass'n* v. *Westside Bancorporation, Inc.*, 636 F. Supp. 576 (N.D. Ill. 1986), aff'd, No. 86-1793 (7th Cir. June 5, 1987).

[6] In the case of the failed savings and loan institution that led to the litigation in *Morrison-Knudsen*, for example, claims of creditors have not been limited to judicial districts within the Ninth Circuit. See, *e.g.*, *Lyons Savings & Loan Ass'n* v. *Westside Bancorporation, Inc.*, 636 F. Supp. 576 (N.D. Ill. 1986) (following *Hudspeth*), aff'd, No. 86-1793 (7th Cir. June 5, 1987); *Ames Construction, Inc.* v. *Pinnacle Associates*, Civ. No. 85CV2543 (Adams County, Colo. Dist. Ct. Mar. 27, 1987) (following *Morrison-Knudsen*).

district court within the Ninth Circuit while others are compelled to present their claims to FSLIC as receiver. Under such a system, the claims of similarly situated creditors almost certainly would be resolved differently, resulting in arbitrary discrimination among claimants. Some courts, such as the district court below, may order specific performance of contracts (see page 11, *supra*), other courts may simply order that similar claims be allowed for pro rata distribution, and yet others would likely order exhaustion. Inequities are bound to result.

The current situation is particularly chaotic in California, because the Ninth Circuit's decision in *Morrison-Knudsen* also conflicts with the decision in *FSLIC* v. *Superior Court*, 180 Cal. App.3d 336, 225 Cal. Rptr. 422 (1986), cert. denied, No. 86-689 (Jan. 27, 1987). In that case, the California Court of Appeal expressly adopted the Fifth Circuit's reasoning in *Hudspeth*. 180 Cal. App.3d at 342, 225 Cal. Rptr. at 425. As a result, the California state courts are dismissing actions in favor of FSLIC's administrative proceedings, while the Ninth Circuit insists that those same proceedings may be maintained in California federal courts. Needless to say, the success of a plaintiff's lawsuit presenting a threshold question of federal law should not depend upon whether it is filed in state or federal court. Review by this court is therefore essential to enable FSLIC to administer a nationally uniform receivership program.

2. Review is also warranted because the Ninth Circuit's failure to require mandatory exhaustion of administrative remedies substantially interferes with the efficient and expeditious processing of claims against insolvent thrifts. By requiring claimants to present their claims for administrative resolution in the first instance, FSLIC is able to achieve a cost-effective and timely disposition of these receiverships' estates through an orderly liquidation. FSLIC's experience indicates that the vast majority of claims, both in terms of numbers and dollar totals, are

allowed, settled, or otherwise resolved administratively without need for review in the district courts. The consequences of bypassing this system would be severe: in the states within the Ninth Circuit alone, there are currently some 17 Bank Board-appointed FSLIC liquidating receiverships, involving 1,400 creditor claims aggregating $7 billion. In the states within the Fifth Circuit, the statistics are equally compelling—the 15 liquidating receiverships in those states involve more that 1,950 creditor claims totalling $2.2 billion. If the Ninth Circuit's ruling were followed in all these cases, the time necessary to resolve creditors' claims would increase dramatically, to the detriment of creditors and the public interest alike. It is difficult to imagine a more serious interference with the process of orderly liquidation.

Moreover, FSLIC as receiver generally cannot fix the time and manner of distribution of assets until it knows which claims are valid. If tribunals other than the receiver were permitted to determine the validity of claims in the first instance, enormous waste, confusion, and delay in the distribution of assets to all creditors would be the inevitable consequence.[7] In addition, if FSLIC were compelled to litigate every doubtful claim in the first instance,

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[7] *Hancock Financial Corp.* v. *FSLIC*, 492 F.2d 1325 (9th Cir. 1974), graphically illustrates the serious delays produced by initial judicial resolution of creditors' claims. In that case, the state superior court appointed FSLIC as receiver of a state-chartered association in 1966. *Id.* at 1326. By late 1971, FSLIC had sold "virtually all the receivership assets" when it received the state court's permission to sell the remaining assets. *Ibid.* Hancock then filed suit in federal court to enjoin FSLIC's sale of those assets. *Ibid.* Although the district court dismissed Hancock's complaint, it issued a temporary injunction to preserve the status quo pending appeal. *Ibid.* That injunction remained in effect for over two years before the Ninth Circuit affirmed the district court's dismissal and dissolved the injunction—eight years after the receivership was established. It was precisely this sort of delay that led Congress in 1968 to extend to FSLIC the same powers in

the legal expenses of the receiver would increase dramatically. Because these administrative expenses of the receiver enjoy first priority for payment, all creditors' recoveries would be reduced pro rata. See 12 C.F.R. 569a.7(a)(1). The result would be a serious threat to the integrity of the federal deposit insurance system and a decline in public confidence in the thrift industry—results that Congress surely wanted to avoid. See *FSLIC* v. *Superior Court,* 180 Cal. App.3d at 342, 225 Cal. Rptr. at 425.

The smooth functioning of the administrative claims process is also crucial to maintaining the integrity of the FSLIC insurance fund. As subrogee to insured depositors, FSLIC is almost always the major creditor of an insolvent thrift and is therefore directly injured by delay in the claims resolution process and by the excessive legal and administrative expenses involved in litigating every creditor's dispute. That injury is especially worrisome in light of the savings and loan industry's widely acknowledged financial difficulties. See *Morrison-Knudsen,* 811 F.2d at 1216; *Independent Bankers Ass'n of America* v. *Federal Home Loan Bank Board,* 557 F. Supp. 23, 25 (D.D.C. 1982).

The large number of insolvent thrifts requiring Bank Board intervention through the appointment of a receiver is unprecedented in the history of the federal deposit insurance system. As a consequence, FSLIC's insurance fund is under the most severe pressures it has ever faced. The General Accounting Office recently determined that the fund was insolvent by more than $3 billion and that efficient and economical liquidation of receivership assets is critical to restoring the fund. General Government Divi-

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receiverships of state-chartered institutions that it had previously enjoyed only in receiverships of federally-chartered institutions. See *Hudspeth,* 756 F.2d at 1101 n.2.

sion, U.S. General Accounting Office, *GAO/GGD-87-46BR, Thrift Industry: The Treasury/Federal Home Loan Bank Board Plan for FSLIC Recapitalization* 1, 3 (Mar. 1987). In a subsequent report, the Comptroller General advised the Bank Board that FSLIC's insurance fund was insolvent by more than $6 billion. Comptroller General, U.S. General Accounting Office, *GAO/AFMD-87-41, Financial Audit: Federal Savings and Loan Insurance Corporation's 1986 and 1985 Financial Statements* 6 (May 1987). Because of the extraordinary number of thrift institution insolvencies in recent years, FSLIC's reserves have been insufficient to permit it to close any but the weakest institutions. See Barth, Brumbaugh, Sauerhaft & Wang, *Insolvency and Risk-Taking in the Thrift Industry: Implications for the Future,* 3 Contemp. Policy Issues 4-6, 15 (Fall 1985). In these circumstances, allowing creditors to bypass the Bank Board's long-standing administrative claims process would have serious consequences for the public interest.

3. These adverse consequences need not be suffered, because the Fifth Circuit is correct in concluding that FSLIC's governing statutes and regulations require mandatory exhaustion of administrative remedies. In view of the compelling need for resolution of the conflict between the Fifth and Ninth Circuits, it is unnecessary to engage in an extended discussion of the merits of the case at this time. For present purposes, it is sufficient to reiterate that Congress has vested the Bank Board with broad discretionary authority over the creation, operation and liquidation of federal thrifts. This Court has already recognized Congress's sweeping authorization for the Bank Board's regulation of the "operation" of such associations in *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 161 (1982). The Bank Board's powers over the liquidation of federal savings and loan institutions derive from the same congressional enactment, Section 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. (& Supp. III) 1464, and they should be given an equally broad reading.

Indeed, the Bank Board's power to regulate liquidation of failed thrifts must of necessity be broadly construed, because Congress has provided no other method for the liquidation of savings and loan associations.[8]

Thus, there can be little question that the Bank Board's mandatory administrative claims procedures were properly promulgated pursuant to its authority "to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations * * * which are insured by the [FSLIC]." 12 U.S.C. 1464(d)(11). The doctrine of exhaustion of administrative remedies provides " 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' " *McKart* v. *United States*, 395 U.S. 185, 193 (1969) (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). That doctrine is fully applicable to the Bank Board's regulations requiring all claims against the assets of failed savings and loan associations in federal receiverships to be presented to FSLIC and the Bank Board for initial resolution. Here, as in *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975), "[t]he statutory scheme is thus one in which the [agency] may specify such requirements for exhaustion as [it] deems serve [its] own interests in effective and efficient administration." The Bank Board has done precisely that, and the courts must respect that determination. *Ibid.*[9]

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[8] Savings and loan associations are specifically excluded from the provisions of the Bankruptcy Code. See 11 U.S.C. 109(b)(2).

[9] Mandatory exhaustion of administrative remedies is supported not only by the Bank Board's statutorily authorized regulations, but by 12 U.S.C. 1729(d). That section expressly authorizes FSLIC as receiver to "settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the [Bank] Board." The power to "settle, compromise, or release claims" implies the power to require that those claims be presented in the first instance to the receiver.

Even if the Bank Board's statutes and regulations requiring mandatory exhaustion were less clear, exhaustion would nonetheless be required under well-settled principles of administrative law. This Court has repeatedly held that claimants must exhaust their administrative remedies before seeking relief in court when the question presented is one within the agency's specialization or expertise and when the administrative remedy is as likely as the judicial remedy to provide the desired result. See, *e.g.*, *McKart*, 395 U.S. at 193-194. Those criteria are plainly satisfied here. For the reasons stated above, it would seriously obstruct and delay the administrative process if both FSLIC and numerous courts across the country were simultaneously engaged in determining claims against a failed institution in federal receivership, and there can be no dispute that the administrative claims process is fully capable of granting complete relief. Accordingly, there is no reason to permit claimants to disregard this process or (as the Ninth Circuit held) to require ad hoc discretionary determinations whether to compel exhaustion to be made on a case-by-case basis.[10]

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[10] We note that the Bank Board's administrative claims process expressly includes provisions for expedited or emergency relief. See, *e.g.*, *Mason* v. *FSLIC*, No. 86-029 (FHLBB July 9, 1987) (Bank Board ordered FSLIC as receiver to abandon prior attempt to foreclose on petitioners' property because receiver had failed to prove compliance with state law procedural requirements for foreclosure); *Casey* v. *FSLIC*, No. 87-009 (FHLBB June 25, 1987) (Bank Board ordered FSLIC as receiver to release to petitioners entire amount in escrow established by failed thrift). Petitioners offer no excuse for their failure to invoke these emergency procedures in this case, and thus there is no merit to their argument (Pet. 15-16, 28) that exhaustion should not be required here because the physical assets at issue allegedly would deteriorate pending completion of the administrative process.

4. We submit that the Court should resolve the present conflict between the Fifth and Ninth Circuits, but further urge that the Court limit its grant of certiorari to the question as stated in this brief (see page I, *supra*). As we have explained, the fundamental threshold question that presently divides the Fifth and the Ninth Circuits is whether creditors of failed thrifts must present their claims in the federal receivership proceedings and exhaust their administrative remedies before pursuing judicial relief. Petitioners have framed the exhaustion question in a manner that is both overbroad and difficult to fathom. See Pet. i (Questions 1 and 2). For example, we do not fully understand what petitioners mean by asking the Court to decide whether FSLIC had "adjudicatory power to determine all claims against the FSLIC and the Federal Home Loan Bank Board in their individual capacities" (Pet. i (Question 1)). Those governmental entities have no "individual capacity."

Petitioners also suggest (but do not separately argue) a number of other issues in their list of questions presented. See Pet. i. Those issues, none of which has produced a conflict among the circuits, are either not ripe for resolution or not independently worthy of review. For example, petitioners ask the Court to decide the appropriate standard of judicial review of FSLIC and Bank Board administrative determinations. Pet. i (Question 3). That issue is premature at this juncture. Petitioners have filed administrative claims with FSLIC as receiver, and those claims are pending. At the conclusion of the administrative claims process, it is entirely possible that petitioners will be sufficiently satisfied with the outcome that there will be no need for judicial review, much less a need to decide the appropriate standard of review applicable in a judicial proceeding. Cf., *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019-1020 (1984) (takings claim held not ripe prior to

completion of mandatory arbitration proceedings and exhaustion of Tucker Act remedy).[11]

Likewise, the petition should be denied insofar as it seeks review of the contention advanced below that the acquiescence of the Supervisory Agent in Sun Belt's consent to the pre-receivership agreement and execution of the Jefferson Lakes construction contract somehow "estops" FSLIC from exercising its statutory obligations as receiver for Sun Belt. See Pet. i (Question 4), 14-15. Whatever the merits of that argument,[12] it remains an essentially factual question as to which there is no conflict in the circuits and no unusual circumstance justifying review by this Court.

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[11] We note that the standard of review issue has never been squarely presented in any of the scores of lower court decisions requiring exhaustion of administrative remedies. In those cases, the courts have simply ruled on motions to dismiss actions brought by creditors of failed thrifts who failed to present their claims to FSLIC for initial resolution. Thus, statements in the opinions of some of the lower courts on this issue have been dicta. See, *e.g.*, *Morrison-Knudsen*, 811 F.2d at 1222; *Hudspeth*, 756 F.2d at 1103.

[12] Petitioners cite only a single state court decision in support of their argument (Pet. 14-15) and ignore the wealth of contrary authority dealing expressly with claims of estoppel against the federal government. See, *e.g.*, *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

CONCLUSION

The petition for a writ of certiorari should be granted limited to the question presented as stated in this brief.

Respectfully submitted.

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Federal Home Loan Bank Board

OCTOBER 1987

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In the Supreme Court of the United States

OCTOBER TERM, 1987

(3)

No. 87-255

MAGD E. ZOHDI, QUALITY CONTRACTING AND SERVICES INC., ET AL., PETITIONERS
v.
THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF SUN BELT FEDERAL BANK, F.S.B., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF FOR FSLIC

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Pursuant to Rule 22.5, petitioners MAGD E. ZOHDI, et al., file this reply to respondent FSLIC's brief, which was filed in this Court on October 2, 1987.

First. We disagree with the Solicitor General's contention (FSLIC BR. 21) that Questions 1 and 2 of our petition for certiorari are "both overbroad and difficult to fathom." Certainly the fundamental question whether FSLIC has adjudicatory power under 12 U.S.C. § 1729 (d) is stated with sufficient clarity. Our reference to Article III in Question 1 (Pet. i) obviously flags "*The* Northern Pipeline *Problem*" lurking in the background. See *Morrison-Knudsen Co., Inc. v. CHG Intern., Inc.*, 811 F.2d 1209, 1221 (9th Cir. 1987). On the other hand, the Solicitor General's casting of the question presented (FSLIC BR. (I)) cuts this case adrift from its statutory moorings and ignores the separation of powers problem that is part of this case.

Second. We agree with the Solicitor General's contention (FSLIC BR. 21) that the question of the appropriate standard of judicial review of FSLIC and Bank Board administrative determinations is premature at this stage. Hence Question 3 (Pet. i) can be put off to another day.

Third. Petitioners strongly oppose the Solicitor General's effort to wipe the certiorari writ clean of the question of the effect of the Bank Board's express written approval of the settlement agreement worked out in federal court and reduced to judgment in this case. See Pet. 5-6 and Appendix "B," Pet. A-22. There is more to Question 4 of our Petition than the "factual question" (FSLIC BR. 22) the Solicitor General would make of it. "As is true of many problems in the law, the answer is to be found not in legal learning but in the realities of the record." *Indianapolis v. Chase National Bank*, 314 U.S. 63, 69 (1941) (Frankfurter, J.). The Bank Board's approval of the settlement agreement below, which triggered the surrender of real property and petitioners' liens valued at 2.8 million dollars, is a reality of the record which this Court should not ignore.

To permit FSLIC to dishonor the Bank Board's prior express approval of the settlement agreement and reject the federal court's judgment is at best to play a cruel joke on petitioners. See *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government"), quoted in *Heckler v. Community Health Services*, 467 U.S. 51, 61 n.13 (1984). At worst, allowing FSLIC to treat petitioners as unsecured creditors of Sun Belt risks a retroactive taking of private property without just compensation. *Cf. Louisville Bank v. Radford*, 295 U.S. 555 (1935) (retroactive application of Frazier-Lemke Bankruptcy Act to pre-existing liens violates

Fifth Amendment); *Armstrong v. United States*, 364 U.S. 40 (1960) (Government action destroying value of petitioners' liens held a "taking" for which compensation due under Fifth Amendment).

At any rate, we submit that the question of estoppel raised in Question 4 of our Petition is a legal issue worthy of this Court's review. Indeed, the very case the Solicitor General cites (FSLIC BR. 22 n.13) as disposing of our estoppel claim, *viz.*, *Heckler v. Community Health Services*, 467 U.S. 51 (1984), rejects any flat rule that estoppel may not in any circumstances run against the Government. "We have left the issue open in the past, and do so again today." *Id.*, at 60.

CONCLUSION

The petition for a writ of certiorari should be granted limited to Questions 1, 2, and 4 of the petition.

Respectfully submitted,

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PETITIONERS' SUPPLEMENTAL BRIEF

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In the Supreme Court of the United States

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MAGD E. ZOHDI, QUALITY CONTRACTING AND SERVICES INC., ET AL., PETITIONERS

v.

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF SUN BELT FEDERAL BANK, F.S.B., RESPONDENT

In order to clarify the Petitioner's standing to file the instant petition for writ of certiorari, this Supplemental Brief is filed pursuant to Supreme Court Rule 22.6.

PROCEEDINGS BELOW

The original lawsuit precipitating this action was a federal court R.I.C.O. action filed by Sun Belt Federal Bank against the owners of the property (Bonfanti, Fackrell, etc.), the general contractor, the architect, etc.

As there were hundreds of material and labor liens filed on the property, several pending bankruptcy proceedings involving the same defendants and the petitioners in this writ application, and other legal actions pending, a settlement conference was held before Judge Polozola in an attempt to resolve all matters before his court.

At this conference the various lien holders agreed to cancel their liens in exchange for certain guarantees by Sun Belt. In addition, some of the bankruptcy matters were to be dismissed. When Sun Belt failed and FSLIC was appointed receiver, the various lien holders filed a motion (and subsequent amended motion) in the District Court seeking an order requiring FSLIC to honor the settlement judgment.

Following the December 23, 1985 settlement conference, the petitioners in this writ application became parties to that action:

> "The Court will approve the settlement as submitted by the parties. And the Court will enter a sixty day dismissal insofar as the federal suit is concerned, just to give me some leeway to work with the parties.
>
> "This settlement is a federal Court order. Under the provisions of *Thibaut versus Ourso*, it will be enforced as written, and also supplemented here in open court today. And I will enforce it." (Transcript p. 62-63)

By filing the above mentioned motion and amended motion, the petitioners became parties and submitted themselves to the jurisdiction of the court. At the December 19, 1986 hearing held on petitioners' motion, Judge Polozola warned the petitioners of the consequences of their motion:

> "I just want to say one thing, so there won't be any question about how I feel about this: should I enforce the settlement, which is probable, I expect those parties who will take over this job to carry out my judgment. And if they don't carry out my judgment, then we will have a hearing to determine whether or not they should be held in criminal contempt of court.

> "And keep in mind, as I told everybody during the conference we have had in this case, that should I find someone in criminal contempt of the court, then the restitution would be required under the victim and witness protection act; and the restitution would be the judgment itself, so that no one could go into bankruptcy and eliminate the judgment.
>
> "In other words I am not going to buy another Bankruptcy." (Transcript p. 3)

The persons he was referring to as "those who will take over this job" were Magd E. Zohdi and the Quality-Standard Joint Venture.

The District Court then made its judgment binding upon all *parties* to the proceedings:

> "The Court finds that the parties did in fact enter into an agreement in this case, the settlement compromise agreement, the terms of which have either been dictated into the record at various times, or have been reduced to writing and filed in the record under the various exhibits that are in the record.
>
> "The court adopts as part of its opinion the settlement agreement that was entered into by the parties which was dictated into the record, as well as the written and signed versions of it which have been filed into the record." (Transcript p. 52)

A copy of the settlement agreement was made a part of the Court's December 19, 1986 Judgment (See Appendix "B" to the Petition for Certiorari).

ARGUMENT

While the Petitioners in this writ application, (Magd E. Zohdi, Quality Contracting and Services, Inc., C.B.S., Inc. and Quality-Standard Joint Venture) never filed a formal motion of intervention, they have been parties de facto since submitting themselves as parties and having their attorney enroll as counsel of record on December 23, 1985 and on various occasions since. To require the filing of such a motion would be a needlessly technical interpretation of Rule 21 of the Federal Rules of Civil Procedure.

A similar question concerning procedural capacity arose in *North Mississippi Savings & Loan v. Hudspeth* 756 F 2d 1096 (5th Cir. 1985). An objection was raised contending that FSLIC was not properly a party to the action as they had never been formally joined. The Fifth Circuit found that although FSLIC was never formally joined, it was a party nevertheless, as requiring formal intervention under the circumstances would render federal pleadings excessively technical in contradiction of Federal rules of Civil Procedure 8(e)(1) and 8(F).

CONCLUSION

As your petitioners became parties in this action on December 23, 1985 by voluntarily submitting themselves to the jurisdiction of the Federal District Court, and subsequently filed formal motions therein, they are now parties with standing to file this petition. Judge Polozola had the authority and jurisdiction to join them as parties under *Thibaut v. Ourso* 605 F. Supp. 1, 3 (1981) and *705 F. 2d 118* (5th Cir., 1981): "A valid compromise binds those who are parties thereto and those with notice who claim under them."

Respectfully submitted,

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